United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

To be argued by
Alfred I. Rosner

75-1425

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P/S

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

vs.

ARON SCHATTEN,

Appellant.

On Appeal from the United States District Court for the Southern District of New York

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APPELLANT'S REPLY BRIEF

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3

TABLE OF CONTENTS

TABLE OF CASES

FEDERAL RULES OF EVIDENCE and other authorities

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FOR THE SECOND CIRCUIT
DOCKET NO. 75-1425

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Preliminary Statement

This Brief is in reply to the Government's final corrected Brief received in the mail on February 5, 1976.

At pp. 2-8, the Government gives a recital of its case and of the defense. Such recital unfortunately omits essential facts, both from the Government's case as well as from that of the defense. The Court, therefore, is respectfully referred to pages 2-17 of Appellant's main Brief which gives a very fair review of the testimonay of all the Government's witnesses as well as that of Schatten, the only defense witness.

ARGUMENT

In a note at p. 10 of its Brief, the Government states:

> "In his Brief Schatten erroneously states that, 'Goldberger was not interrogated either as to any photographic identification relating to Schatten or as to a lineup identification involving Schatten.' Brief at 10). Goldberger did testify about the photographic identification (Tr. 66-67), although not about the lineup."

Schatten is correct. It is the Government which is in error. The pictures which Goldberger picked out were not of Schatten but were faces familiar to him of the delivery-men who brought him the shirts. (Tr. 66-67)

At pp. 10-11, the Government contends that its recitals of the facts (which, as has been shown, includes the erroneous statement that Goldberger had testified to a partial identification of Schatten), "the jury could reasonably have concluded that the two men who had delivered the shirts to Goldberger were agents of Schatten and that Schatten had gained possession, actual or constructive, of those shirts virtually contemporaneously with their theft."

No argument is required to show that this conclusory contention is based on the rankest speculation and conjecture rather than on solid evidence.

If the deliverymen were Schatten's agents, when, where and under what circumstances did Schatten hire them or appoint them as his agents, and what instructions did he give them? The Government, it must be conceded, has utterly failed to point to any evidence in the trial record which answers this query.

If"Schatten had gained possession, actual or constructive, of these shirts virtually contemporaneously with their theft," as the Government contends (at p.11), where, when, from whom and under what circumstances did Schatten acquire possession of the shirts, either actually or constructively? Again the Government fails to point to any evidence in the trial record which will enlighten the Court, but would prefer that this court, in violation of Schatten's rights, should rely on the rankest kind of speculation or conjecture rather than on solid evidence, as the law requires, before Schatten or any other defendant may be convicted under due process of law.

The Government further argues that Schatten had guilty knowledge of the stolen character of those shirts because he was willing to sell the shirts for less than half of their wholesale cost and had requested payment in cash; had effected the sale without the customary invoicing; had used men other than his usual employees and a rental truck, rather than his own, to deliver the shirts; and cashed the check, without endorsing it himself, through his friend Moucatel--even though the company Schatten owned had its own bank and checking accounts. (p.11)

Again the Government assumes what it has completely failed to prove, to wit, that Schatten was the person who sold the shirts to Goldberger. In fact, the Government fails to inform this Court, as it should have, that Goldberger definitely did not identify Schatten in court as the man who sold him the shirts. (Tr.55) Therefore it must be deemed as having failed to prove that Schatten is the man who demanded payment in cash without the customary invoicing. The Government likewise failed to prove that Schatten ever hired either of the two heretofore unidentified deliverymen; nor did the Government prove its unsupported allegations that Schatten was in any way connected with the Ryder rental truck; or that he ever possessed the stolen shirts; or even a single shirt; or that he was ever seen in the company of the thief or thieves, or in the company of anyone who had possession of any of the shirts; or that he ever had any conversation with anyone who was criminally connected with the shirts.

It is elemental law that a check made payable to "Cash" need not be endorsed. If Schatten had anything to do with the stolen shirts, or knew that the check was in payment of such shirts, and was looking to cover his tracks, it is most unlikely that he would have his long time friend Moucatel cash this check for him. Once the check was traced to Moucatel, it would then be immediately traced to him. In fact, when

FBI agent Kosednar contacted Moucatel, who was a Government witness for whose credibility the Government must be deemed to have vouched, it was Schatten who assured Moucatel that the check was a good one and to tell Kosednar that Schatten negotiated the check with him. Moucatel so informed Kosednar. Schatten told Moucatel that he got the check for $2443 for the sale of his wife's ring. (Tr.111-113) Moucatel knew Mrs. Schatten had jewelry and had seen her wear jewelry. (Tr.116) The cashing on July 25, 1974 of the August 1, 1974 post-dated Goldberger check was a short term loan to Schatten by Maucatel who has been his friend for 12-15 years (Tr. 87-88, 106, 118-119).

The Government also omits Schatten's testimony that he has no personal checking account. His wife has. He did not want to put the check into his Arpen Trucking account because he then would have to tell his wife he had to sell the ring. Tr.263)

Finally, the Government argues "the jury could properly have considered Schatten's 1972 conviction of a similar offense under 18 U.S.C. sec. 659 as probative of his criminal knowledge and intent and properly inferred such guilty knowledge from Schatten's unexplained possession of recently stolen property."

That the Government is in error in considering the prior conviction for stealing stereos in Foreign Shipment as being for an offense similar, instead of dissimilar to the present charge of possession of stolen shirts in Interstate Shipment, is fully discussed at pp.18-30 of Appellant's main Brief.*

* Judge Gurfein, on the motion for bail pending appeal, in his dissent, stated in substance: "I cannot for the life of me see how the larceny of stereos can be used to prove that the possession of stolen shirts was with knowledge that the shirts were stolen." He accused the Government of improperly using this prior conviction for the crime of larceny to beef up its case of criminal possession. His two collegues were silent on the point and in fact did not express any opinion on any legal point, but Judge Gurfein was very outspoken in his legal opinions, all of which favored Schatten.

At p.19, the Government appears to contend that in a criminal Possession case, the prior conviction, in order to be admissible on the issue of knowledge and intent, need not also be for the crime of criminal Possession, but could be for the crime of Larceny. The position it appears to press is that so long as the acquisition of the goods was unlawful, the prior crime would be admissible on the issue of knowledge or intent in the present case where the crime charged is criminal Possession.

If the prior crime need not be similar to the present crime charged to be admissible on the issue of knowledge or intent, but the unlawful acquisition be the test of admissibility, then it would follow that if the stolen goods were acquired unlawfully, whether by the commission of the crime of Larceny or by the commission of the crimes of Burglary, Robbery or even Murder, a conviction for any of these crimes would be admissible in a criminal Possession case. That such test is unacceptable and has been rejected by the courts throughout the country need not be belabored in this Brief.

Furthermore, since the Government failed to prove by explicit evidence rather than by rhetoric that Schatten possessed a single stolen shirt, there was nothing for him to explain. That being the case, it would seem that the trial court committed plain error in instructing the jury as to the inference to be drawn from possession of goods recently stolen. (This Point is fully discussed at pp.44-46 of Appellant's main Brief; see also United States v. DeCicco, et al. (1960,2d Cir.), 435 F.2d 478, where,in dealing with the issue of admissibility of prior crimes, the Court stated (at 483):

> Evidence of prior crimes is customarily not admissible to show the disposition, propensity or proclivity of an accused to commit the crime charged. (Citing numerous authorities.)

The Court further went on to enunciate the test to be used in such cases, as follows (483):

> * * * the evidence is compensatingly probative if the element of intent, etc. is placed in issue in the case at trial, either by the nature of the facts sought to be proved by the prosecution or the nature of the facts sought to be established by the defense. United States v. Smith, 283 F.2d 760, 763. (2d Cir. 1960)

Since at the very outset, in his opening to the jury, Schatten's counsel had made it very clear that Schatten would defend on the ground he had never committed the offense charged, accordingly, as in DeCicco and in Smith, intent or knowledge was never placed by him in issue. It therefore followed that proof of an alleged similar act or crime was irrelevant and had been improperly admitted at Schatten's trial.

Lumbard, Ch.J., concurring in the DeCicco case, took an even more restrictive view, stating that (486):

> The rule regarding the admission of evidence of similar crimes can be simply stated. Such evidence because of its highly prejudicial nature, is not admissible until the defendant has raised the issue of motive or intent. United States v. Smith, 283 F.2d 760, 763 (2d Cir. 1960). (Emphasis supplied)

Schatten unquestionably denied possession even of a single shirt and so did not raise the issue of intent or knowledge. Therefore, under the rule as enunciated by Ch.J. Lumbard, the Government had no right to offer evidence, over the defendant's objection, of a similar crime, even assuming arguendo that the prior conviction was for a crime similar to the present crime. (See also United States v. Smith, supra, cited in United States v. DeCicco, supra.)

Since at p.12 of its Brief, the Government takes the position that Schatten's sworn testimony as to how he obtained the Goldberger check should not be credited, it should have been required as part of its burden of proof, in its frantic efforts to overcome the presumption of innocence with which Schatten was clothed, to affirmatively prove by hard competent evidence (and not by unfair inflammatory rhetoric) precisely how the check links Schatten beyond a reasonable doubt to the sale of the shirts to Goldberger. Instead, the Government is arbitrarily asking that this Court discredit Schatten's explanation as to how he obtained the check. If it can succeed in getting the Court to do so, then it contends that this Court should then as a second step assume that if Schatten did not get the check from Artie to whom he swore he had sold his wife's wing because he needed money to pay for his family's vacation, then he necessarily must have gotten it from the deliverymen. It is respectfully submitted that such a bare assumption is completely unwarranted and completely illogical because the Government

has utterly failed to prove precisely when, where, how, from whom and under what circumstances Schatten obtained the check for $2443, if not from Artie. After all, the check could have passed through any number of hands before it wound up in Artie's hands or in Schatten's hands after having been given to the deliverymen by Goldberger. What cannot be denied is that in the trial record there is not even a speck of evidence that Schatten ever met with the deliverymen and received the check from them; or that he was ever seen in the company of the unknown thief or thieves or was acquainted with any of them; or that he was ever seen in the company of anyone who had possession of the stolen shirts, or that any part of the shipments on the stolen truck was found in his garage. Not only has the Government failed to prove an essential element of its case, to wit, that Schatten knew that the shirts were stolen--which lack of proof alone would require a dismissal of the indictment (See United States v. Tavoularis (2d Cir.), 515 F.2d 1071)--but, what is even more significant and important, it has utterly failed to prove beyond a reasonable doubt that Schatten had possession of the shirts or was in any way linked with such possession.

At pp. 13-16, the Government attempts to answer Appellant's POINT VI (pp.42-44 of his main Brief) that the admission in evidence of the testimony by Goldberger of the extremely prejudicial hearsay conversation he had with the two unidentified deliverymen constituted reversible error.

First it contends that Schatten failed to object on the ground that the statements were hearsay. No sooner did the prosecutor ask his first question when defense counsel immediately objected but was overruled (Tr.61) Not only would an experienced judge like Judge Wyatt know that the question called for hearsay testimony, but since the conversation attempted to be elicited by the prosecutor was not competent on any ground, a general objection was proper. Having been overruled, counsel then objected and was overruled when the prosecutor asked a leading question. (Tr.62)

Significantly, the Government does not attempt to prove that this prejudicial conversation was not hearsay or that the alleged error was not plain error.

The Government then attempts to justify the admission of this prejudicial incompetent testimony by claiming that the statements were properly admitted as the statements of Schatten's agents made within the scope of their agency and to explain a simultaneous act.

The fallacy of the Government's argument is that it assumes or presumes, without the slightest evidence to support its argument, that the deliverymen were Schatten's agents and the Government further assumes or presumes, without any evidence in support of its position, that they were acting within the scope of their (unproved) agency.

In its note at p.15, in referring to Rule 801(d)(2)(D) of the Federal Rules of Evidence, the Government, in order to take an agent's statement out of the category of objectionable hearsay, "to adduce such statements must still prove by a fair preponderance of the evidence, independant of the statements themselves that the statements were made within the scope of the agency." (Emphasis supplied but quotation is Government's.)

In United States v. Pacelli, 491 F.2d 1108,1117 (2d Cir.), the Court reversed because of the Government's failure to prove that the out-of-court statements were made by agents of Pacelli. Likewise, in the present case, the Government failed to prove by the requisite preponderance of the evidence that the deliverymen were appointed by Schatten as his agents. It therefore follows that the conversation including the part dealing with the business card (which is not, in order to qualify under Rule 801(a)(2) of the Federal Rules of Evidence, "nonverbal conduct of a person intended by him as an assertion") was not sanctioned by Rule 801(d)(2)(D) of the Federal Rules of Evidence. Furthermore, the Government casually

overlooks Schatten's testimony that it was he who gave Goldberger's his business card (Tr.160-161); p.12 of Appellant's main Brief; and see Goldberger's testimony in which he admitted he could not say positively that the deliverymen gave him that card. (Tr.78-80, 83; p. 7 of Appellant's main Brief.)

Incidently, the deliverymen never even mentioned Schatten's name to Goldberger nor did they explain to Goldberger precisely who allegedly had given them the card which they are supposed to have given to Goldberger.

The Government also argues (at p.15) that agency was established by the fact that Schatten received the check so swiftly after Goldberger had allegedly given it to the deliverymen. Again the Government assumes facts which are unproved.

There is no proof in the trial record as to when in July the check was given to the deliverymen by Goldberger, nor was there the slightest proof as to when Schatten obtained the post-dated August 1, 1974 check. All that the trial record discloses is that the truck containing the shirts was stolen on July 17, 1974 and that Schatten presented the check to Maucatel on July 25, 1974. (Tr. 90,106,118-119; pp. 8-9 of Appellant's main Brief.)

In United States v. Consolidated Laundries Corp., 291 F.2d 563 (2d Cir.1961), the Court stated:

> It is axiomatic that agency cannot be proved solely by declarations of the alleged agent, but must be established by independent proof. (Citations omitted) The independent proof may be circumstantial but it must be "substantial," Ong Way Jong. v. United States, 9 Cir., 1957, 245 F.2d 393,395, and not "slight," United States v. Stromberg, 2 Cir. 1959, 268 F.2d 256, 267.

In Section 563, p.457 of Corpus Juris Secundum, in discussing "Hearsay evidence, it is stated:

> Testimony by third parties of statements of a purported agent constitutes hearsay and is, without more, insufficient to prove the alleged agency in issue.

It is respectfully submitted that the objection was well taken and that the extremely prejudicial conversation was not admissible on any competent ground; and certainly not on the specious unproved ground or theory of agency as urged by the Government.

The Government contends (at pp.17-23 of its Brief) that the District Court properly permitted the Government to prove that Schatten committed an offense under 18 U.S.C. sec, 659, in 1970, of which he was convicted in 1972, and it claims that such offense was similar to the present charge.

That such contention was devoid of merit, see pp.18-30 of Appellant's main Brief; and see also discussion of United States v. DeCicco, supra at pp. 4-6 of this Reply Brief. There was no question, judging from the remarks of Judge Wyatt at the preliminary hearing of October 11, 1975, that he would allow into evidence, over counsel's objection, as part of the Government's case-in-chief, the prior conviction. Had he indicated otherwise at the hearing, or later at the trial had he changed his mind relative to the intended ruling, competent counsel would certainly have had the right and good sense not to call Schatten as a witness - considering the weakness of the Government's case - thereby precluding the Government from eliciting Schattens's prior conviction on the issue of credibility. Furthermore, there would then be no factual evidence in the trial record of the nature of the underlying circumstances of the prior crime involving the theft of the Unisonic AM-FM stereos.

At page 20 of its Brief the Government points out that Schatten's trial counsel (not present Appellate counsel) at the preliminary October 11, 1975 hearing stated that Schatten had been convicted of the same crime as that he is being charged with here.

The following colloquy occurred (page 6):

THE COURT: What is the charge in this case? My recollection is that of receipt of stolen goods,

MR. JOSSEN: Possession of stolen goods, your Honor.

THE COURT: A simple one count indictment that the defendant had in his possession stolen goods, all right.
Now what was the prior conviction for?

MR. COOPER: Possession of merchandise stolen from Interstate Shipment.

THE COURT: Same offense.

Counsel had unquestionably been misinformed. The prior conviction was for stealing Unisonic AM-FM stereos from Foreign Shipment. which was not the same crime as the crime presently charged, to wit, Possession of stolen shirts from Interstate Shipment.

It is respectfully submitted that it became the ethical duty of the Government Assistant U.S. Attorney to have immediately corrected defense counsel's unfortunate factually incorrect statement as to the prior conviction. That duty was definitely owed both to the defense and to the Court. Instead, the Assistant U.S. Attorney took immediate advantage of counsel's mistaken information, and stated (p.8)

"The Government's position is further that the Government should be entitled to prove the underlying circumstances of that conviction as a similar act bearing on the issues of intent and knowledge in this case.

THE COURT: It certainly strikes me that way.

MR. COOPER: Very well, your Honor, I respectfully except to your Honor's ruling.

At the end of the Government's case, the Government offered in evidence this prior conviction (Exhibit 23) and contended that this conviction was for a crime similar to the crime for which the defendant was presently on trial (142-146). In allowing this prior conviction, over objection, into evidence, the Court then knew what the prior conviction was really for and was no longer misled by the information which had been furnished by the misinformed defense counsel. Nevertheless, the court allowed this prior conviction into evidence on the theory that it was for "an offense similar to the offense for which the defendant, Mr. Schatten, is here on trial." (Tr. 145)

In a memorandum of law which present counsel submitted to Judge Wyatt at the time of sentence, present counsel correctly stated what the prior conviction was for and contended it was dissimilar from the present crime. While Judge Wyatt had high praise for the memorandum of law, he adhered to his ruling and pointed out that counsel's arguments "ought to be addressed to an appellate court." (p.3, Sentence Minutes)

What the Government is really arguing at p.21 of its Brief is that it had a weak case and it therefore should be excused from offering Schatten's prior conviction into evidence, although it failed to prove its relevancy, and it should further be excused even if it be held by this Court that it was demonstrating to the jury that Schatten had a propensity for committing crime, particularly where radios were concerned. The prosecutor's summation clearly proves this latter statement.

The Government at p.22 contends that "similar acts need not be simultaneous or substantially contemporaneous with the offense in the pending case to be admissible." It further contends that "Schatten's reliance on New York State authorities for a contrary view is thoroughly inapposite."

It is respectfully submitted that under the particular circumstances of the present case, even if the prior crime were similar to the present crime, nevertheless, it should have been held inadmissible because it was, as pointed out at pp.30-31 of Appellant's Brief, too remote to be relevant.

It is further respectfully submitted that under the circumstances of the present case, this Court should follow the salutary New York cases cited at pp. 30-31 of Appellant's Brief. Not to do so, as the Government urges, would mean that this Court does not believe that a person can ever be rehabilitated and that "once a criminal, always a criminal," and that, for the purpose of proving knowledge or intent, a prior conviction for a similar crime, no matter how remote, will be admissible as relevant.

At page 23, the prosecutor contends that his summation was proper and certainly free of any "plain error." When a prosecutor argues that his summation was free of any "plain error," generally that is a reluctant admission that he sinned and that counsel was asleep at the switch while the prosecutor was delivering inflammatory rhetoric. He grudgingly admits that he was guilty of an "inadvertent and mistaken assertion that Schatten had been convicted in 1972 for selling stolen radios (rather for the theft of AM-FM stereos) and harmless. * * *"

Then at p. 27 he again concedes that, in passages he quotes, he again inadvertently erred in asserting that Schatten had been convicted in 1972 of selling. How many times is a prosecutor permitted to "inadvertently err" before an Appellate Court will tell him, "You did not inadvertently err. What you repeatedly said was intentional, coldly calculated, and deliberately and maliciously intended to bring about the conviction of the defendant; and we will teach you and others of your ilk that we will not countenance unethical prosecutorial conduct by punishing you in a meaningful way, to wit, by depriving you of the conviction you obtained by your unfair tactics."

Then at p. 28, the prosecutor admits that he "may have been ill-advised to employ the term of art "common scheme" in comparing the prior misconduct with the crime proved here."

Unfortunately, the prosecutor's inflammatory summation was much more seriously objectionable than he is willing to admit. The extent of his dereliction from the permissible path of a due process of law summation is amply set forth at pp. 32-36 of Appellant's main Brief.

In his ardor for an unjust conviction the prosecutor even deliberately misquoted Schatten's testimony. (See note at p.33 of Appellant's main Brief.) Incidently, the prosecutor is wrong when he claims that defense counsel did not object to his summation. He did at p. 235 but to no avail. (See pp. 35-36 of Appellant's main Brief relative to this important objection which the Court erroneously overruled, to the serious prejudice of the defendant.)

At pp.37-41 of Appellant's main Brief, Appellant points out that the prosecutor improperly and inexcusably made himself an unsworn witness against Schatten and most improperly commented on the defendant's failure to call certain witnesses. In the Government's Brief an adequate answer to this accusation is lacking.

In the New York Post (January 31, 1976) Governor Carey at the State Bar Association dinner was reported as calling for "effective deterrents" to end what he charged was "great abuse" by "errant prosecutors."

He asked:

> "Is it fair for the prosecutor to knowingly flout the rules of evidence with impunity, both before the grand jury and at trials?"

The Governor further said:

> "The reason prosecutorial abuses proliferate is because there are no truly effective deterrents. * * * The most that an overzealous prosecutor risks is losing a case on appeal that was weak to begin with." It would seem that Governor Carey must have had a case such as Schatten's in mind when he made that keen observation.

It is respectfully submitted that this Court under its supervisory power and as a matter of law should unhesitatingly reverse this judgment of conviction because to allow the conviction to stand would most "seriously affect the fairness, integrity or public reputation of judicial proceedings." United States v. Atherton, 297 U.S. 157,160. In fact, it would constitute the abnegation by this Court of its supervisory powers to enforce a fair trial for defendant Schatten were it not to reverse his conviction so unjustly obtained and would reward an undeserving prosecutor.

It is respectfully submitted that Appellant's POINT VII (pp.44-46 was most inadequately answered by the Government.

C O N C L U S I O N

It is respectfully submitted that in totality, the cumulative errors and complaints raised in Appellant's Brief, persuasively indicate that Aron Schatten did not receive the type of fair trial that is mandated by "due process of law;" and that as a matter of law and of justice and in the exercise of its supervisory powers, the Court should reverse the judgment of conviction and either dismiss the indictment; or, in alternative, grant him a new trial.

Respectfully submitted,

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